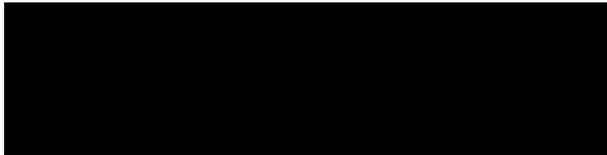


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: WAC 04 245 50206 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software design development and consulting firm, with two employees. It seeks to employ the beneficiary as a software engineer pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because he determined that the record did not establish the proffered position as a specialty occupation or that the beneficiary was qualified to perform the duties of a specialty occupation. He also found the record to contain inconsistent information concerning the size of the petitioner's workforce.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with a statement from the petitioner, and new and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

The initial issue before the AAO is whether the duties of the proffered position establish it as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job offered to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a petitioner must establish that its position meets one of four criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it seeks the beneficiary’s services as a software engineer. At the time of filing, the petitioner indicated that the beneficiary would be engaged in the design, programming and analysis of software programs for its clients, working on its premises and at the offices of VTEKH, Inc., a client located in Schaumburg, Illinois. To establish the beneficiary’s employment, the petitioner has submitted an August 23, 2004 letter of employment addressed to the beneficiary; the petitioner’s August 5, 2004 listing of the beneficiary’s duties; an August 9, 2004 contract with VTEKH; and a November 30, 2004 work order issued under that contract listing the beneficiary’s duties for VTEKH.

Although the petitioner has indicated that some of the beneficiary’s duties would be performed at its offices under its direct control, the record also establishes the petitioner as an employment contractor in that it intends to place the beneficiary at another work location to perform services under a contract with a third-party company. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. Accordingly, in the

instant case, the AAO must consider the duties the beneficiary would perform in providing contractual services to VTEKH clients, as well as those he would carry out on an in-house basis.

To establish the beneficiary's work for VTEKH, the petitioner, at the time of filing, submitted copies of pages from a signed three-year contract with VTEKH, Inc., dated August 9, 2004 but effective as of August 4, 2004. This document, although it is incomplete, indicates that VTEKH is also a consulting business that offers software development services under contract and is in need of individuals "on a contract basis," who are skilled in application development and customizations of enterprise resource planning and customer relationship management applications. Although the petitioner offered the contract as confirmation of the beneficiary's employment at VTEKH, it does not identify the beneficiary. Instead, it refers to "multiple candidates" and the "software engineer." The contract outlines the services to be provided to VTEKH but not the clients to which VTEKH would pass along these services.

In response to the director's request for evidence, the petitioner submitted a statement of work and a November 30, 2004 work order executed under the VTEKH contract. The work order identifies the beneficiary and lists the duties for a position described as a programmer analyst.

Based on the evidence of record, the AAO does not find the petitioner to have submitted sufficient documentation to establish the nature of the duties the beneficiary would perform for VTEKH clients. The contract submitted by the petitioner at the time of filing does not identify the beneficiary, nor is it accompanied by subcontracts/work orders covering the beneficiary's services and describing the duties he would perform for VTEKH's clients. The November 30, 2004 work order, which does identify the beneficiary and the duties he would perform for VTEKH, is dated nearly three months after the filing of the Form I-129 and may not be used to establish the duties of the proffered position. A petitioner must establish eligibility at the time of filing a nonimmigrant petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, like the contract submitted by the petitioner at filing, the work order is not supplemented with contracts or statements of work identifying the duties the beneficiary would perform for VTEKH clients, the actual users of the beneficiary's services. Therefore, the AAO finds the record to offer no evidence that would establish the beneficiary's duties under contract to VTEKH.

In the itinerary of employment provided by the petitioner in response to the director's request for evidence, the beneficiary is identified as working at VTEKH's Illinois office between October 1, 2004 and December 1, 2006, performing in-house projects for the petitioner in California only from December 1, 2006 until October 1, 2007. Therefore, the petitioner has failed to document the duties to be performed by the beneficiary during all but 11 months of the three-year period requested on the Form I-129. Accordingly, it has not established the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) for the entire three years. Neither has it established that it would employ the beneficiary in a specialty occupation for this period. Pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B), an H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation.

The AAO also finds that the record fails to establish that the petitioner has provided an itinerary of definite employment, required of U.S. employers when a beneficiary's duties will be performed in multiple locations. See 8 C.F.R. §§ 214.2(h)(2)(i)(B). The dates of employment in the itinerary submitted by the petitioner are not consistent with those in the November 30, 2004 work order. The work order indicates that the beneficiary is to provide services to VTEKH from December 6, 2004 to September 29, 2007 rather than during the October 1, 2004 to December 1, 2006 period indicated in the itinerary. The record offers no explanation for the inconsistent dates. Accordingly, the itinerary submitted by the petitioner in response to the director's request for evidence will be discounted. It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the record does not establish the petitioner's compliance with the requirements at 8 C.F.R. §§ 214.2(h)(2)(i)(B).

On appeal, counsel submits a copy of its November 8, 2004 contract with Raven Software Solutions, Inc., in support of the petitioner's contention that the beneficiary would work on in-house projects for this particular client, as well as VTEKH, Inc. The AAO notes, once again, that this contract was entered into by the petitioner after its filing of the Form I-129. Accordingly, the petitioner may not rely on it to establish the duties of the proffered position. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In light of its finding that the petitioner's proffered position is not a specialty occupation, the AAO will not proceed with an analysis of the beneficiary's qualifications to perform the duties of a specialty occupation under the regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C). A beneficiary's credentials to perform a particular job are relevant only when a job is found to be a specialty occupation.

With regard to the director's finding that the petitioner's misrepresentation of the size of its staff has undermined the reliability of all the evidence in the record, the AAO accepts counsel's explanation of the reasons that the petitioner listed two employees on the Form I-129 but submitted an organizational chart in response to the director's request for evidence that identifies the petitioner's president and three staff members. The petitioner's hiring of a third employee during the period of time separating its September 2004 filing of the petition and its December 2004 response to the director's request for evidence and its inclusion of the petitioner's president on its organizational chart are sufficient explanation of the discrepancy identified by the director.

Beyond the decision of the director, the AAO notes that the beneficiary's performance of the in-house duties of the proffered position at the petitioner's new location in Cupertino, California violates the terms of the certified Labor Condition Application (LCA) submitted at the time of filing. On the date it filed the Form I-129, the petitioner's offices were located in Belmont, California and the LCA reflects that location and its prevailing wage rate. Belmont and Cupertino do not, however, fall within the same metropolitan statistical area and have different wage rates for software engineers, as reported by Employment & Training Administration of the U.S. Department of Labor. Accordingly, the petitioner's employment of the beneficiary in Cupertino does not comply with the conditions of the LCA submitted at filing. See 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). For this reason as well, the petition will be denied.

For reasons related in the preceding discussion, the record does not establish the duties of the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the petitioner has complied with the filing requirements at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) or at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). Therefore, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.